Kanawha Stone Company, Inc. *and* Operating Engineers, Local 132, AFL–CIO. Cases 9–CA–35738 and 9–CA–36216

June 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 23, 1999, Administrative Law Judge Karl H. Buschmann issued the attached decision.[1] The Respondent filed exceptions, a supporting brief, and a response to the General Counsel's exceptions. The General Counsel filed limited exceptions, a supporting brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

The General Counsel has excepted to the judge's recommended dismissal of allegations that the Respondent unlawfully refused to consider and hire 38 union member applicants.

For the following reasons, we adopt the judge's recommendation.

A. Background

In *FES,* 331 NLRB 9 (2000), which issued after the judge's decision, the Board set forth the elements that must be met to establish refusal-to-hire and refusal-to-consider violations, the respective burdens of the parties, and the stage at which issues are to be litigated. In order to assess whether the *FES* burdens have been met in this case, it is first necessary to consider the Respondent's hiring process, which includes a hiring policy and hiring criteria.

The record supports the Respondent's claim that it has had the same hiring policy in effect since its inception. Under this policy, superintendents assess their needs on a particular project and then hire accordingly. (Frequently, a superintendent will only have 24 hours within which to hire someone for a job.) The Respondent does not maintain a list of potential applicants unless it is conducting a mass hiring. (Applications are typically not filled out until an employee's first day of work.) Finally, hiring is not done at the main office (where almost all of the union applicants, including those of May 5, sought work). Rather, it is done on the jobsite.

In addition to this hiring policy, the record supports the Respondent's claim that it uses three criteria when hiring for a job: (1) employees on temporary layoff, (2) former employees, or (3) referrals from existing employees. Persons who do not fall into one of these three categories are not considered for hire.

B. Refusal to Consider

With respect to refusal-to-consider allegations, the Board held in *FES* that the General Counsel must show, as part of his case-in-chief, that the employer excluded applicants from a hiring process, and that antiunion animus contributed to the decision not to consider the applicants for employment. 331 NLRB at 11. Once this is established, the burden will shift to the Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Id. Here, the record establishes that the union applicants were excluded from the Respondent's hiring process and that there was some antiunion animus. However, even assuming that the General Counsel thereby met his threshold burden under *FES*, we find that his case-in-chief was rebutted by the Respondent's showing that it lawfully would not have considered the applicants, even absent their union activity, because none of the applicants met any of the Respondent's three hiring criteria.

[1] The judge issued a supplemental decision correcting the transcript on March 31, 2000.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by granting employees the benefit of show-up pay during the organizing campaign, we need not rely on the judge's finding of animus. *American Freightways Co.,* 124 NLRB 146, 147 (1959). Absent a legitimate business reason, it is sufficient to show that the benefit was granted during an organizing campaign. *Mariposa Press*, 273 NLRB 528 (1984).

We adopt the judge's finding that the Respondent unlawfully discharged employee Philip Selman in violation of Sec. 8(a)(3). Contrary to our concurring colleague, we also adopt the judge's rationale, including his reliance, in finding animus, on conduct which did not independently violate Sec. 8(a)(1). In this regard, it is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful. *Meritor Automotive, Inc*., 328 NLRB 813 (1999) (In agreeing with the judge's finding that the respondent's discipline of one employee and discharge of another were not motivated by their union activities, the Board disavowed the judge's suggestion that because there is no evidence establishing an independent violation of Sec. 8(a)(1), there can be no direct evidence of antiunion animus.) There were no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by instituting a training program during the union organizing campaign and by its November 18, 1997 memorandum to employees.

[3] The record is clear that only employee Philip Selman was questioned about his union activities. The judge's third conclusion of law which states, "By coercively interrogating employees about their union activities or sympathies, the Respondent violated Section 8(a)(1) of the Act," is therefore amended to read "By coercively interrogating Philip Selman about his union activities or sympathies, the Respondent violated Section 8(a)(1) of the Act."

C. Refusal to Hire

With respect to the refusal-to-hire allegations, under *FES* the General Counsel must show, as part of his case-in-chief, that the Respondent was hiring or had concrete plans to hire, that the applicants had experience or training relevant to generally known requirements or announced requirements for the position in question, and that antiunion animus contributed to the decision not to hire. 331 NLRB at 10. Once these elements are established, the burden will shift to the Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. For the following reasons we find that the Respondent did not unlawfully refuse to hire the union applicants.

1. January 1998 applicants[4]

On three occasions in January, union members applied for jobs with the Respondent. On January 15 and 21, the Union took members to the Respondent's main offices to apply for work. On both visits, a sign in the Respondent's main office stated that no applications were being taken, and the applicants were told that the Respondent was not hiring. Although the Respondent recorded the names and phone numbers of the applicants, it did so at their insistence, and informed them that it was not hiring at the time.[5] None of these union applicants were hired.

The Union alleges that it took applicants to apply for work at the Respondent's Kenova jobsite on January 29. The record reflects that instead of going to the Kenova site, the union officials took the applicants to the State Department of Highways where they knew the Kenova job superintendent would be that day. The superintendent told the union officials that he was not hiring.

With regard to these January applicants, we find that the General Counsel failed to meet his threshold burden. Under *FES*, a requisite element of the General Counsel's refusal-to-hire case is a showing that the Respondent was hiring or had concrete plans to hire when the applications were submitted. This element was not established. Rather, the record shows that the Respondent was not hiring in January when these applicants arrived at its main office and at the State Department of Highways Office near the Kenova jobsite. Nor is there evidence that the Respondent had concrete plans to hire at that time. As established by the record, under the Respondent's hiring policy, it normally considers applicants and hires them only when specific openings arise. Such openings did not occur until the spring and summer of 1998, months after the attempted January applications. Further, consistent with the Respondent's policies, those individuals hired later in 1998 submitted applications within a matter of days of their hire.

Accordingly, under these circumstances, we find that the General Counsel failed to meet his burden under *FES* of showing that the Respondent unlawfully failed to hire the January union applicants.[6]

2. May 1998 applicants

On May 5, seven union members arrived at the Respondent's main office to apply for work. They asked to fill out applications, but were told that the Respondent was not currently accepting applications. Also, a sign in the Respondent's main office stated that no applications were being taken. They left a list of their names and phone numbers with the Respondent. None of these individuals were hired, despite the fact that the Respondent hired three people in May. In fact, the record reflects that between March and August 1998, the Respondent hired 36 employees.

We will assume that the General Counsel met his threshold burden under *FES* of establishing an unlawful refusal to hire with regard to the May applicants. Nonetheless, we find that the Respondent successfully rebutted the General Counsel's case. Thus, the record establishes that the hiring that was done by the Respondent in May (indeed at all times in 1998) was consistent with the Respondent's application of its hiring criteria. Specifically, none of the union member applicants fell within any of the three categories from which the Respondent hires. Consistent with the Respondent's hiring criteria, all of the employees hired during that period were former employees, relatives of employees, or referrals by employees. Thus, even though seven union members

[4] All of the following dates are 1998, unless otherwise stated.

[5] Taking the names of the union members at their insistence was contrary to the Respondent's policy of not maintaining lists except in the event of a mass hire. The General Counsel points out that, one day before the union members applied on January 15, several applicants, not affiliated with the Union, left their names with the Respondent. However, these people were never contacted or hired by the Respondent.

[6] *See Irwin Industries,* 325 NLRB 796 (1998) (The respondent did not violate Sec. 8(a)(3) and (1) of the Act by refusing to hire 30 job applicants who applied for work en masse and designated themselves as "volunteer union organizers" on their applications. The Board relied on the facts that at the time of the mass application, the respondent "was not in a hiring mode," "there was no work immediately available for [the applicants]," and the respondent's established practice was not to hire employees simply on the basis of the submission of applications with no follow-up contacts with the respondent. The record established that, historically, employees of the respondent were hired on the basis of referrals, prior work experience with the respondent, or continued and persistent efforts to obtain work after the submission of an application.) Cf. *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999), where the Board agreed with the judge that the evidence presented was insufficient to support the General Counsel's theory that a similar hiring policy as applied at the respondent's jobsites unlawfully discriminated on the basis of union activities.

sought work with the Respondent on May 5, during a period when some hiring was occurring, the record established that they lawfully would not have been hired.

Finally, with regard to the General Counsel's allegation that the Respondent's hiring policy is inherently destructive of employee rights, the judge found, and we agree, that the record does not support such a conclusion. The record establishes that, applying its hiring policy and criteria, the Respondent hired 36 people between March and August 1998. Seven of those employees were affiliated with a union. Even though few of those employees showed any interest in union organizing activity, this alone is not sufficient to support a finding of an inherently destructive hiring policy.[7]

The Respondent has excepted to the judge's findings that Philip Selman is not a statutory supervisor and that two conversations Selman had with management in November 1997 constituted unlawful interrogations in violation of Section 8(a)(1).

Contrary to our dissenting colleague, we adopt the judge's finding and rationale that Philip Selman was not a statutory supervisor during the period September 27—October 11, 1997, and sporadically thereafter through November 8, 1997, when he was in charge of building an erosion silt fence at the Dudley jobsite with a group of several laborers.[8] As found by the judge, Selman had been employed for over 8 years and had served in a "supervisor's capacity" in only isolated instances, i.e., once in 1996 for approximately a month, and again on the instant silt fence assignment. We agree with the judge that this brief, sporadic, and temporary role with respect to the building of the silt fence does not make Selman a supervisor under Section 2(11) of the Act. Rather, we agree with the judge that his role was that of a leadman whose supervisory authority was "intermittent, short lived, and circumscribed in such a fashion that any action taken was either at the direction of management or specifically authorized by management." In this regard, the record establishes that in one isolated instance Selman indicated on a September 23, 1997 daily timesheet that employee Ricky Dimitroff was a "lazy worker," "wanted to stand around and watch," and was "out of here." In a subsequent phone conversation with the Respondent's vice president of operations, Les Putillion, Selman reported that Dimitroff was "lazy," "wanted to stand around," and "wouldn't help the other guys." Putillion subsequently instructed Selman to tell Dimitroff that he wasn't needed anymore. Even assuming this incident could be interpreted as an effective recommendation of Dimitroff's discharge, it was an isolated incident and insufficient to show the exercise of supervisory authority. It is well settled that "the exercise of some 'supervisory authority' in a merely routine, clerical or sporadic manner does not confer supervisory status." *Masterform Tool Co.*, 327 NLRB 1071 (1999); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). See also *St. Francis Medical Center-West*, 323 NLRB 1046 (1997), and cases cited therein (employee's temporary assumption of supervisory duties is not sufficient to establish statutory supervisory status).

For the reasons stated by the judge, we further agree that the Respondent violated Section 8(a)(1) of the Act when management questioned Selman about his union activities. On November 7, Selman was invited by Putillion to attend a meeting. When Selman asked if the meeting was about the Union, Putillion responded by asking him if he had anything to confess. On the way to that meeting on November 10, Selman rode with Respondent's superintendent, George Phipps. During the car ride, Phipps asked Selman if he had recently been contacted by the Union. Selman said "no." Phipps then asked him if he ever belonged to a union, to which Selman responded he had been a member of United Mine Workers. The judge found, and we agree, that such questions by high-level supervisors within days of each other were coercive.[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kanawha Stone Company, Inc., Nitro, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN HURTGEN, concurring and dissenting in part.

Contrary to the majority, I find that Philip Selman was a supervisor from September through mid-November 1997. During that period, he was in charge of the silt fence installation portion of the Dudley project. It is well settled that an individual who possesses any one of the

[7] In *Belfance Electric,* 319 NLRB 945, 946 (1995), the Board adopted the judge's finding that, where the respondent hired friends, relatives, or business acquaintances, the evidence was insufficient to show that hiring decisions were based on union-related considerations. The judge found, and the Board agreed, that where the respondent had a policy of hiring people who were not complete strangers, the respondent's motivation was not irrational.

[8] It is undisputed that Selman was a nonsupervisory employee before and after his silt fence assignment.

[9] *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984) (Sec. 8(a)(1) is violated where either the words themselves or the context in which they are used show an element of coercion or interference.), affd. 760 F. 2d 1006 (9th Cir. 1985).

authorities enumerated in Section 2(11) is a supervisor,[1] regardless of the frequency with which that authority is exercised.[2] Further, where an individual makes effective recommendations to management in one of the areas listed in Section 2(11), supervisory status will be found.[3] Here, the record establishes that Selman effectively recommended the discharge of employee Ricky Dimitroff. Thus, based on Selman's comments, both written and verbal, to Vice President of Operations Les Putillion, Dimitroff was terminated.[4] Putillion did not independently investigate the truth or accuracy of Selman's comments. Rather, he relied on what Selman said about Dimitroff's performance in deciding that Dimitroff should be terminated. The fact that the supervisory authority was limited in time does not detract from supervisory authority. This is not a case where such authority is intermittent, e.g., exercised only when an admitted supervisor is absent. Rather, Selman was given his authority for the entire duration of the silt fence installation project. Accordingly, he was a supervisor for that period of time.

Because I find that Selman was a supervisor during the relevant time period, it follows that the Respondent did not violate 8(a)(1) by allegedly interrogating him on November 7 and November 10, 1997.[5]

Finally, although I agree with the judge that the Respondent violated Section 8(a)(3) by unlawfully discharging Philip Selman, I do so for slightly different reasons. In finding this violation, I rely on the timing of Selman's January 20, 1998 layoff, i.e., 1 day after management witnessed his handbilling on the jobsite. I also rely on the fact that the Respondent acted contrary to its established practice when it subsequently informed Selman that his layoff was permanent.[6] I also rely, for purposes of establishing "animus," on President Art King's November 18 memorandum to employees in which he stated, "Although it is your right to sign an authorization card it is your duty to see that the union does not organize KSC."[7]

Unlike my colleagues, I do not find animus in statements made by King in a December 12 speech to employees, and separately to Selman. In my view, these statements are protected by Section 8(c) and cannot therefore "be evidence of an unfair labor practice under any provisions of this Act."[8]

Finally, I have expressed my view that Selman was a supervisor from September to November, 1997. Thus, his union activity during that period was not protected. However, it appears that he continued his union activity thereafter, up to and including his handbilling on January 19, 1998. Respondent's act of laying him off was due, at least in part, to his union activity as an employee. Respondent has not shown that it would have discharged him in any event for unprotected activity.

Andrew Lang and *Theresa Donnelly, Esqs.,* for the General Counsel.

Karen Hamrick Miller and *Mark S. Weiler, Esqs.,* of Charleston, West Virginia, for the Respondent.

Lafe C. Chafin, Esq. (Barrett, Chafin & Lowry), of Huntington, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried before me on February 2–5, 1999, in Charleston, West Virginia, on a consolidated complaint, dated November 18, 1998, alleging that the Respondent, Kanawha Stone Company, Inc. violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). More specifically, the complaint alleges that the Respondent (a) interrogated employees about their union sympathies; (b) threatened them by strongly urging them that the Union should not organize the Company; (c) announced a training program because of the employees' union sympathies; and (d) granted show-up pay to discourage union activity, all as independent violations of Section 8(a)(1). The complaint further alleges, as violations of Section 8(a)(1) and

[1] *Ohio Power Co. v. NLRB*, 176 F. 2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

[2] *NLRB v. Magnesium Casting Co.,* 427 F. 2d 114, 117 (1st Cir. 1970), affd. on procedural grounds 401 U.S. 137 (1971).

[3] *See Entergy Systems & Service,* 328 NLRB 902 (1999) (Board found crew leaders to be statutory supervisors on the basis that their recommendations to management affected the promotional opportunities of employees).

[4] On the daily time sheet, Selman wrote that Dimitroff was a "lazy worker," "wanted to stand around and watch," and "out of here." In a phone conversation with Putillion, Selman told Putillion that Dimitroff was "lazy," "wanted to stand around," and "wouldn't help the other guys."

[5] *Union Square Theatre Management,* 326 NLRB 70 (1998) (in finding that the technical directors are statutory supervisors, it follows that the respondent did not violate Sec. 8(a)(1) by making allegedly coercive statements to Technical Directors Timothy Hamilton and Patrick Mann, and did not violate Sec. 8(a)(3) by discharging Hamilton).

[6] Indeed, as part of its defense to the unlawful refusal-to-consider and hire union applicants, the Respondent avers that its first preference is hiring from laid off employees.

[7] Although there were no exceptions to the judge's dismissal of the allegation that this statement violated Sec. 8(a)(1), I find that it substantively constituted a coercive statement that evidenced animus.

[8] See my dissents on this point in *Ross Stores, Inc.,* 329 NLRB No. 59 (1999), *Wire Products Mfg. Co.,* 326 NLRB 625 (1998), enfd. 210 F. 3d 375 (7th Cir. 2000), and *Affiliated Foods, Inc.,* 328 NLRB 1107 (1999). Where employers make statements that neither threaten nor promise, but merely express a preference that their employees remain unrepresented, those statements are not unlawful. Rather, they constitute expressions of free speech protected under Sec. 8(c). I rely on the statutory language of Sec. 8(c) which specifically provides that, where a statement comes within the protection of that provision, it "shall not constitute or be evidence of any unfair labor practice."

(3), that the Respondent laid off Philip Selman because of his union activities and that it failed and refused to consider for hire or hire 32 applicants at its offices in Nitro, West Virginia, or at its jobsite near Kenova, West Virginia.

The Respondent filed a timely answer, in which the jurisdictional allegations in the complaint were admitted and in which the allegations of unfair labor practices were denied.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Kanawha Stone Company, Inc., is engaged in excavating and constructing out of its Nitro, West Virginia office. In the conduct of its business, it has purchased and received goods valued in excess of $50,000 directly from points outside the State of West Virginia.

The Respondent admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, International Union of Operating Engineers, Local 132, AFL–CIO, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

In September 1997, the Union, Local 132 of the Operating Engineers, attempted to organize the employees at Kanawha Stone Company in Nitro, West Virginia. Phillip Selman, an employee, had contacted the Union in September and met with Alan Bruce Tarpley, the Union's business manager and Donald Lee Huff, of the Affiliated Construction Trades Foundation, which assists certain locals in their organizational campaigns. Selman received authorization cards from the Union; he distributed cards to his fellow employees and signed his own card on September 9, 1997 (G.C. Exh. 4).

Selman who had been employed as an operator since August 1990 was assigned in late September 1997, with a crew of up to four other employees to set up a silt fence at the Dudley jobsite. This was the first work done on the project. In mid-October, George Phipps became the superintendent on the Dudley site with the supervisory authority over the entire project. Selman's silt fence assignment as crew leader ended on November 8, 1997, when he became an equipment operator reporting to Superintendent Mark Trowbridge and George Phipps.

On November 7, 1997, Selman called Leslie Putillion, the chief superintendent of the Company, to discuss job related issues. During that conversation Putillion asked him to attend a meeting. When Selman inquired whether the meeting was about the Union, Putillion asked whether Selman had anything to confess. Selman attended the meeting on November 10, 1997. George Phipps offered Selman a ride to the meeting. On their way, Phipps asked Selman whether somebody by the name of Bob Huff or Donnie Huff had called him. Selman denied any such calls. Phipps also inquired whether anyone from Act Foundation (the Union) had called him. Selman denied any such calls. Phipps finally asked whether he had ever belonged to a union. Selman replied that he had belonged to the UAW, the United Mineworkers of America.

Selman attended the meeting on November 10, 1997, which was attended by all supervisors and whose purpose was to meet with the Company's lawyers and to discuss the Union. Selman did not consider himself to be a supervisor, but he remained at the meeting even though nonsupervisors were expected to leave.

Approximately a week after the November 10, 1997 meeting, Selman had a conversation with Phipps on the Dudley jobsite. On this occasion, Selman informed Phipps that he was a volunteer union organizer. Phipps replied that he suspected it, when they were going to the meeting a week earlier.

According to Selman's testimony, Arthur King, president of the Company visited the jobsite that same day and discussed the Union with the employees. In the presence of all the employees on the job and the two supervisors, Phipps and Trowbridge, King said, "he didn't want anybody in the Company to sign authorization cards to okay the Union, or stuff like that to let the Union come in" (Tr. 122). Selman spoke at the meeting stating that he was a union organizer. He also brought up the Union's training program saying that it was free, where laborers could train or learn new skills and operators could learn to switch from a tractor to a grader. According to Selman, King responded that the Company was in the process of setting up a training program. After the meeting, King came up to Selman and said that he was really surprised about Selman and that "he [King] was going to fight me tooth and nail to do everything he could to keep the Union out of Kanawha Stone" (Tr. 124).

The Respondent disputed that the meeting between King and the employees at the Dudley jobsite occurred on about November 17, 1997. According to the Respondent, such a meeting actually occurred sometime in December 1997, as was indicated by Selman's own notes as well as his unequivocal testimony of King to the effect that he had a conversation with Selman and the employees on December 12, 1997.

I find the Respondent's version of the date to be more credible. Selman's written notes reveal that the conversation occurred during the first and second week in December (R. Exh. 18). Selman's testimony in this regard was equivocal and repeatedly referred to his written notes. Moreover, King recalled during his testimony that the meeting occurred on December 12, 1997. During that conversation, King conceded having made the remark that he would resist the Union's effort to organize in every way he could.

Prior to the December 1997 conversation, King sent a memorandum dated November 18, 1997, addressed to the employees which reads as follows (G.C. Exh. 5):

> Kanawha Stone Company, Inc. (KSC) has been advised by some of our employees that the Affiliated Constructions Trade Foundation has been talking to some of our group. I believe that you are entitled to know our position on this subject. KSC is strongly opposed to having our employees represented by any union.
>
> Although it is your right to sign an authorization card it is also your duty to see that the union does not organize

> KSC. If a union is voted in and negotiations for a contract begin, the benefits you can receive depend entirely on what the Union and KSC agree on. A new contract may provide you some benefits you do not have now; however, it may eliminate some of your current benefits. Negotiations start with only what the law requires—minimum wage.
>
> If you are approached by any bargaining agency please ask questions regarding initiation fees, dues, fines, etc.
>
> It is our firm belief that a union is not necessary for the employees of Kanawha Stone Company. We have established a fair compensation program, good working conditions and an open relationship for you without the involvement of a union. We are interested in your concerns and continue to have an open door policy. If you have any questions or concerns, please talk with us.

In December, Selman had a brief conversation with King about the Union. Selman was working on a tractor when King pulled up in his car and asked how he was doing and how it was going with the Union. Selman replied that it was going pretty slow.

On January 19, 1998, Selman and five union representatives, including Huff distributed union literature at the Dudley jobsite. Supervisor Jeffrey Brumfield walked by the handbilling activity as it went on for about 1-½ hours (G.C. Exhs. 6, 46).

On the following day, January 20, 1998, after working a full day, Brumfield drove up in his truck and informed Selman that he was no longer needed, and that it was all they had for him. He was asked to turn in any company equipment such as a chain saw or a radio. Selman attempted to contact King and other supervisors but was unable to do so until a week later. Selman spoke to King and asked whether he was going to be called back to work. King replied that they had a new policy, that once you got laid off, you were permanently laid off. King further suggested that Selman should hunt for work or just go and hunt for work some place else.

Selman drove by the Dudley project on at least four to five times after his layoff. He observed that a lot of work remained to be done (Tr. 133):

> They was—and ditches to be done. There was slopes to be pulled. They were some pipes to be put in. They were drain inlands to be set. All sorts of cleaning and fine tuning and rocks to be shot and a mountain to be took off, and just the job wasn't done yet, ma'am. There was a lot to be done there.

Selman also testified that the following pieces of equipment were necessary for the completion of the job, namely the construction of a shopping mall (Tr. 133):

> There was drills and hose and bulldozers and trucks and graders and rollers. All sorts of kinds of pieces.

With the exception of a crane, Selman was qualified to operate the varies pieces of equipment. He could have "run various size tractors and hose and rollers, trucks, dump trucks . . . . graders."

The employee complement on the Dudley project was not reduced but augmented on the day following Selman's layoff. At least three employees were added on January 21, 1998, and thereafter.

On four occasions, several union members accompanied by union organizers attempted to seek employment at Kanawha Stone Company. On January 15, 1998, Union Representatives Donald Huff, Bruce Tarpley, Robert Means, and Craig Harvey went to Respondent's main office with job applicants Wendy Coutz, Ginny Wall, and Burt Melton to apply for work. The office secretary wrote down their names (G.C. Exh. 13). The applicants were never contacted.

On January 21, 1998, Huff with 25 union members visited the Respondent's offices for the purpose of applying for employment. The office secretaries recorded their names and telephone numbers, but none of the applicants were hired (G.C. Exh. 14).

On January 29, 1998, Huff with two union representatives accompanied three union members and went to Respondent's jobsite in Kenova, West Virginia, to apply for work. They spoke to Respondent's superintendent, James Cooper. Cooper informed them that he was not hiring anyone.

On May 5, 1998, Huff with a group of about seven union members visited the Company's main office to seek employment. The office secretary informed them that they were not accepting any applications. In all four instances, the spokesman for the groups identified themselves as union members. In addition, most of the applicants and union representatives wore union insignia.

III. ANALYSIS

The employee status of Phillip Selman is at issue, because he had been assigned to be in charge of building the erosion silt fence at the Dudley site with a group of several laborers. The General Counsel argues that Selman's status as an employee never changed as a result of the assignment and that his function was no more than that of leadman. Already in the middle of the following month, Phipps had been assigned as superintendent of the Dudley project. The work on the silt fence ended on about November 8, 1997. There is no disagreement that Selman was an employee prior to the silt fence assignment and thereafter, when he was laid off.

At first blush, the Respondent's argument has some support in the record. Selman and his two to four laborers were the first employee contingent on the Dudley project in late September 1997. The Respondent argues that Selman was the first supervisor at the site, that he completed time sheets for the employees and supervised them in their work. Selman according to the Respondent, hired his own son and fired an employee by the name of Ricky Dimitroff. He had a company credit card, keys to the office, a cell phone, and was paid rent for his truck. He also attended the supervisors' meeting when the Company's attorneys discussed the Union. His signature appears on various documents in the spaces reserved for supervisors.

On closer examination, however, Respondent's argument fails to establish Selman's supervisory status. Selman had been employed for 8 years and served in a "supervisors capacity" in only isolated instances, once in 1996, for about 1 month and again on the silt fence assignment. According to the Company's time sheets, his silt fence assignment began on Septem-

ber 27, 1997 (G.C. Exh. 44). That assignment lasted until October 11, 1997, and became sporadic thereafter. Selman worked on such assignment as setting up the office trailer, developing a hauling road, and clearing the site. According to the time sheets, his "supervision" work began on November 1, 1997, and resumed on November 8, 1997. Even assuming that "supervision" and "silt fence" work was the assignment, which the Respondent claims to be indicative of supervisory authority, it is clear that Selman's brief, sporadic and temporary role in supervision cannot qualify him as a supervisor in Respondent's management hierarchy.

This is particularly so when his authority, albeit on a temporary basis, is examined under the criteria established by Section 2(11) of the Act:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

The Respondent's argument that Selman "hired and fired employees" does not answer the question whether he had the authority to do so. The record does not show that Selman did anything more than make routine assignments to the laborers or that he had the authority to hire or fire or effectively to recommend such action. In one instance, Selman reported to Putillion that a man on his crew was a lazy worker. Putillion then instructed him to send the laborer home. Selman merely followed his supervisor's instruction when he ordered the worker to go home. Selman then asked a management official, Rick Lantz, whether his son, Josh Selman, could work at the jobsite. Lantz gave his approval and sent the necessary forms to the worksite. Josh Selman completed the forms and worked under his father's direction. These are the instances to which the Respondent referred in the assertion that Selman hired and fired employees. It is clear, however, that management made the decisions, not Selman. At most, it can be argued that Selman effectively recommended the actions taken by management. However, these two instances were only isolated instances, but they also fall within Respondent's general hiring practice, where such recommendations by any employee, not only supervisors, were regularly accepted by management, as discussed in greater detail below.

The Respondent points to several secondary indicia of supervisory status, including the possession of credit cards and keys to the office, the payment of rent for the use of his vehicle, the signing of timesheets, as well as his presence at the supervisory meeting. On closer examination, the record shows that Selman was told to attend the supervisors' meeting about the Union, but he never attended any regularly scheduled supervisors' meetings, such as the annual winter conference. While he received rent for his vehicle, other supervisors had a company truck, which was permanently assigned. Selman signed time sheets, but usually under the direction of supervisors or for the convenience of the Employer because there was no one else on the jobsite.

In sum, the record does not show Selman as an individual who possessed any of the enumerated indicia of a supervisor, nor was he shown to have exercised any independent judgment in the performance of his leadership status. Instead, his role was that of a leadman whose supervisory authority was intermittent, short lived, and circumscribed in such a fashion that any action taken was either by direction of management or specifically authorized by management. It is well settled that an intermittent assignment does not confer supervisory status. Moreover, Selman, an operator, directed a crew of laborers. An employee's exercise of routine technical judgment in directing less-skilled employees in accordance with the employer's standards, does not constitute the exercise of "independent judgment" that would make the employee a "supervisor" under Section 2(11). *Ten Broeck Commons*, 320 NLRB 806 (1996).

The law is well settled, "the exercise of some 'supervisory authority' in a merely routine, clerical, perfunctory, or *sporadic* manner does not confer supervisory status." *Masterform Tool Co.*, 327 NLRB 1071 (1999). Mindful that the "the burden of proving that an individual is a supervisor is placed on the party alleging that supervisory status exists," I find that the Respondent has failed to show Selman's supervisory status.

A. Independent Violations of Section 8(a)(1)

When supervisor Phipps drove to the company meeting on November 10 with Selman in his truck, Phipps asked him if someone by the name of Huff had been in touch with Selman. Phipps made sure that he had the correct name by calling his son from his speakerphone about the name. Phipps asked Selman again whether he was sure that nobody from the ACT Foundation had called him. Finally, Phipps asked him if he had ever been in the Union. Selman admitted his prior union membership, but he denied that he had anything to do with the Union. Phipps was the superintendent at the Dudley project where Selman was working.

The series of questions by an important supervisor during each other's proximity of ridesharing was clearly coercive, particularly where as here Phipps' questioning was anything but casual. Three days earlier Putillion had put Selman on the defensive by asking him whether he had anything to confess. This was an obvious reference to the Union. I find such questions clearly coercive and I accordingly find that the Respondent violated Section 8(a)(1) of the Act. *American Signcrafters*, 319 NLRB 649 (1995).

The complaint next alleges as a violation of Section 8(a)(1) the language in the memorandum of November 18, 1997, issued to the employees by the Company's chief executive (GC Exh. 12):

> Kanawha Stone Company, Inc. (KSC) has been advised by some of our employees that the Affiliated Constructions Trades Foundation has been talking to some of our group. I believe that you are entitled to know our position on this subject. KSC is strongly opposed to having our employees represented by any union.
>
> Although it is your right to sign an authorization card it is also your duty to see that the union does not organize KSC. If a union is voted in and negotiations for a contract begin, the benefits you can receive depend entirely on

what the union and KSC agree on. A new contract may provide you some benefits you do not have now; however, it may eliminate some of your current benefits. Negotiations start with only what the law requires—minimum wage.

If you are approached by any bargaining agency please ask questions regarding initiation fees, dues, fines, etc.

It is our firm belief that a union is not necessary for the employees of Kanawha Stone Company. We have established a fair compensation program, good working conditions and an open relationship for you without the involvement of a union. We are interested in your concerns and continue to have an open door policy. If you have any questions or concerns please talk with us.

The General Counsel argues that the phrase, "it is also your duty to see that the union does not organize KSC" is coercive and tends to interfere with the employees' freedom of choice. The General Counsel may be correct in taking that position if the sentence had been said in isolation. However, implicit in the tenor of the memorandum is the recognition that the question whether to support the Union or not is up to the employees. To be sure, the memorandum demonstrates antiunion animus, but it does not rise to the level of an 8(a)(1) violation.

The Respondent also stands accused of attempting to discourage union support among its employees by announcing a training program. Selman testified that King made the announcement at the November 17, 1997 meeting in response to Selman's comments about the benefits of the Union and the benefits of the Union's training program. As already discussed, Selman's testimony about the November 17 date did not accord with his notes. Moreover, Selman's notes about the meeting do not contain any reference to the Company's announcement about a new training program (R. Exh. 18). King credibly testified that the meeting occurred on December 12, 1997. King also testified that he may have responded at that time to a reference by Selman about the union training program by stating that the Company had shown a training video at the Dudley jobsite about the safety problems involving large number of trucks at a jobsite. Several witnesses for the Respondent testified about the existence of the Company's videotapes prior to any union campaign which were shown to employees to train them about such topics as safety, crane operation, and hazardous materials. In sum, I find that the record does not support the allegation that the Respondent attempted to discourage union support by specifically announcing a new benefit in the form of a training program, and I therefore dismiss the allegation.

The next allegation in the complaint, that the Respondent granted employees show-up pay is supported in the record. The Respondent argues that the record does not support the inference that this benefit was granted to discourage union activity and that, in any case, the benefit was insignificant and temporary. By memorandum of February 13, 1998, employees were informed as follows (GC Exh. 10):

> Effective February 16, 1998 Kanawha Stone Co. will begin an across the board show up time to all hourly employees with the exception of management hourly employees. The eligibility requirements are as follows:
>
> You must have been employed with Kanawha Stone Co. for a minimum of 6 months.
>
> If your Superintendent calls you and tells you not to come to work the show up time is canceled for the shift.
>
> The rate of pay for the show up time will be $14 per hour, even on the Federal Pay Projects.
>
> The show up time will be 1 hour at the flat rate of $14 per hour, for each shift that applies.
>
> The time span for the show up time will be from December 1st to April 1st each work season it is used.
>
> There will be no show up time between April 1st and November 30th.
>
> Please make an effort to call off the employees when possible.
>
> Charge all show up time to code 900-100 as it will be charge to your project.
>
> If you have any questions concerning this memo or its intent please call the office at your convenience.

Selman testified that the employees had discussed "about not getting paid for just coming and s[i]tting" (Tr. 140). In this connection, the Board has held in *Yale New Haven Hospital*, 309 NLRB 363 at 366 (1992):

> Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employees rights under the Act. However, the business reason may be established by a showing that the benefits were granted in accordance with a preexisting established program, *Mariposa Press*, 273 NLRB 528, 544 (1984); *PYA/Monarch, Inc.,* 275 NLRB 1194, 1195 (1985).

Here, the benefit was granted during the union campaign without any explanation. Considering the timing of the new program, as well as Respondent's antiunion animus, I find that the Respondent violated Section 8(a)(1) of the Act.

B. The Layoff of Phil Selman

The record clearly shows that Selman was the leading and only union activist. Selman was interrogated by supervisors. He was open about his union support during meetings between management and employees and in his conversations with management. For example, Respondent's chief executive told Selman who had revealed his efforts to organize the employees, that he [King] would fight him tooth and nail to keep the Union out of Kanawha Stone Company. King also stated that he was disappointed in Selman because of his union activities.

On January 19, 1998, Selman with several union representatives distributed union literature at the Dudley jobsite in the presence of management. On the following day, Respondent's superintendent, Jeffrey Brumfield, notified Selman that he was no longer needed and that he was laid off. Selman spoke to King a week later to inquire whether he would be recalled, but King answered that he should consider himself on permanent layoff and look for another job.

Selman had been an employee in good standing for about 8 years and been laid off from time to time, but he had never been told that he was permanently laid off. Indeed, in years past, Selman was frequently given the opportunity to perform electrical and carpentry work or to build cabinets during a time when other employees were laid off. Clearly, Selman's permanent layoff was unprecedented and it directly followed his most open and notorious union activity. Considering the Respondent's unequivocal demonstration of its antiunion animus, as well as the timing of the layoff and its unprecedented permanent nature, I conclude that a prima facie case of an 8(a)(1) and (3) violation has been established. Under *Wright Line*, 251 NLRB 1083 (1980), the Respondent has failed to demonstrate that Selman would have been laid off even in the absence of any union consideration. This is particularly so, where, as here, the record shows that work on the Dudley jobsite continued with equipment which Selman was sufficiently skilled to operate. The Respondent's practice had been to assign operators to various pieces of machinery, so that Selman could easily have been assigned to operate another piece of equipment once his machine (a D–8 Dozer) was no longer needed. Indeed, not only were all other operators retained during that time, but the Respondent found it necessary subsequently to add additional employees on the jobsite. I accordingly discredit Brumfield's testimony that Selman's layoff was unrelated to his union activity.

C. The Refusal to Hire

The efforts by the Union to gain employment for its members on four separate occasions are not disputed. On January 15, 1998, four union representatives, including Huff and Tarpley, went to Respondent's offices with three union members to apply for jobs as construction workers. Among the three were Wendy Coutz and Ginny Wall who were highly qualified equipment operators. Tarpley spoke to the receptionist, explaining that he had seen a sign saying that the Company was not accepting applications, but that he had a few good union members, construction workers who would like to apply for work. The receptionist replied that they were not taking applications. After Tarpley spoke to Art King about the purpose of their visit, the secretary took down their names and telephone numbers. The union officials testified that they were not seeking employment for themselves but for the three union members, and that they expected to be contacted once the Respondent decided to accept applications.

On January 21, 1998, Huff took about 25 union members to the Respondent's offices. Huff, acting as spokesman, inquired whether the Respondent was accepting applications. The receptionist said, "[N]o." Huff also spoke to William Hillborn, a vice president, who confirmed that the office was not accepting applications. Hillborn also declined to take down the applicants' names, saying that it was unnecessary. The office secretary, when reminded that King had instructed her to make a list of the applicants' names, recorded their names and telephone numbers (GC Exh. 14).

On January 29, 1998, several union officials, including Huff, accompanied three union members to Respondent's jobsite at Kenova. They spoke to James Cooper, the superintendent on the job. They informed him that they were qualified operators and offered to leave their names and telephone in order to apply for jobs. Cooper refused, saying that he did not hire on jobsites.

On May 5, 1998, Huff with a group of seven union members visited the Company's offices to apply for employment. Ronald Burdette, a business agent for Operator's Local 132, spoke on behalf of the group requesting to fill out applications. The office staff informed the applicants that they were not accepting applications.

The Respondent has never contacted any of the union representatives or any of the applicants about a job, even though it hired 36 employees during the period of March 16 through August 24, 1998 (GC Exh. 3).

The General Counsel argues that the Respondent refused to consider or hire union affiliated applicants in violation of Section 8(a)(3) and (1) of the Act, because the applicants were union members and that the Respondent's hiring policy is inherently destructive of the Act. The General Counsel makes the arguments even though the record is clear that the Respondent had prominently displayed a sign, which read that it was not accepting any applications. The General Counsel further acknowledges that the Respondent had among its workforce numerous union members. In that regard, the General Counsel states that most of these were members of the United Mine Workers of America, who had no interest in organizing the workforce.

The Respondent argues that it was not in the hiring mode at the time the union members applied and that it had no obligation to consider or hire the applicants, because it has a hiring policy which relies exclusively on hiring friends, relatives, or business acquaintances of existing employees. According to the Respondent, hiring is done by superintendents in the field but not from any lists of applicants.

The General Counsel moved to amend the complaint to reflect the testimony of Respondent's chief executive who explained the Company's hiring policy. The complaint was amended by paragraph 10(d):

Respondent, by the maintenance of its hiring policy, failing to consider or hire the employees listed in the complaint.

The elements of a discriminatory refusal to hire case are: The employment application, the refusal to hire, the employer's knowledge that the applicants were union supporters, the employer's union animus, and the refusal to hire because of such animus. *Aneco, Inc.*, 325 NLRB 400 (1998); *Little Rock Electric*, 327 NLRB 932 (1999). The General Counsel has certainly demonstrated that the union applicants made a determined effort to apply on four separate occasions, and that the applicants were well qualified as equipment operators, laborers, and truck drivers. The record also shows that the applicants were not hired, not even considered for hire, and that the Employer harbored antiunion animus. The record, however, fails to show that the Respondent was accepting applications for jobs at the time the union members applied and that the Respondent refused to consider for hire or hire the applicants because of their union affiliation. The record shows that the Employer had posted a sign to the effect that it was not accepting any applications at the times the applicants made their determined efforts

on January 15, 21, and 29, 1998, and again on May 5, 1998. According to the complaint, the Respondent refused to consider the union applicants on or about March 16, 1998, and on May 5, 1998. It is General Counsel's contention that the Respondent should have, but failed to consider any of the union applicants on March 16, 1998, when it hired one employee to perform flagging duties and in July and August 1998, when it hired numerous employees with the skills similar to those of the union applicants as operators, truck drivers, and laborers. The record shows that the Respondent hired approximately 18 operators, 8 truckdrivers, and 4 laborers (GC Exh. 3). The evidence also shows that the dates shown on their applications fell within days of their actual hiring date, which suggests that the Respondent did not maintain a file of applications or a list of applicants. Indeed, King's testimony shows that he instructed the office personnel to assemble a list of the union applicants' names merely to appease them. The record accordingly shows that with one or two exceptions, the Respondent did not hire any employees until July or August, nor were they hired pursuant to a list of applicants maintained by the Employer. To suggest that the Respondent discriminated against the union applicants, because they were not considered for employment months after they had placed their names on Respondent's list, is not very persuasive, where, as here, the Employer in the ordinary course of business did not maintain a list of applicants nor seek any applicants at the time the union members visited Respondent's offices. Moreover, the consistent testimony of Respondent's witnesses shows that employees are usually hired at the jobsite by the superintendent in charge of the project, and that only rarely has the Company ever done any mass hiring, at least not since 1997.

The Company's hiring policy was explained by Respondent's chief executive and characterized by the General Counsel as "an essentially closed door policy which limits access to former employees or referrals from insiders" (GC Br. p. 21). King testified as follows (Tr. 482, 497–498):

> [W]e do not hire from lists. We hire from referrals. We hire from past employees, rehires, friends, and family members.
>
> . . . .
>
> We will hire from—we will bring back our people that are laid off, and then we will go to referrals, Company rehires and referrals, and referrals from friends and family. I would say that my understanding of our practice we naturally bring back the laid off people first and as far as the balance of it I don't know that there is an order to it.

According to the Respondent, this policy has been in existence since the Company's inception and certainly prior to the Union's organizational attempt. The consistent testimony of superintendents as well as Respondent's management personnel reflects the Company's adherence to that policy. For example, the 37 employees hired in the spring and summer of 1998 were either former employees, relatives of employees, or referrals by employees. In many cases, they were relatives of employees who referred them. The record contains a chart, prepared by counsel, which summarizes the testimony showing the name and date of hire of each employees, their supervisors and jobsites as well as the basis for employment (R. Exh. 38).

The General Counsel has argued that the policy is inherently destructive of employee rights, because the practical effect of such a policy is to exclude union members. Yet the Respondent's workforce included numerous union members, primarily members of the UMW. The Respondent points to approximately seven employees out of the 37 recently hired employees who were affiliated with a union. Several employees were also members of the Operating Engineers. For example, Bronson Cheeks and his brother William Curtis Cheeks were members of the Operating Engineers. Jeffrey Brumfield was a member of the Laborers' Union. Other employees were hired, even though they were members of the UMW. To be sure, few if any of those employees had shown any interest in any union organizing activity, as pointed out by the General Counsel, but it is an indication that the Respondent's hiring policy could not on this record be declared to be destructive of employee rights.

I find, that the record does not support a prima facie case of a refusal to hire in violation of Section 8(a)(1) and (3) of the Act. Had the General Counsel made out a prima facie case, the Respondent has shown that these applicants would not have been hired even in the absence of any union considerations. The Company has rarely, if ever, hired anyone from a list of applicants, nor did the union members try to apply at a time when the Company was in a hiring mode. I, therefore, dismiss these allegations in the complaint.

CONCLUSIONS OF LAW

1. Kanawha Stone Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers, Local 132, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their union activities or sympathies, the Respondent violated Section 8(a)(1) of the Act.

4. By granting employees show-up pay to discourage the employees' union activity, the Respondent violated Section 8(a)(1) of the Act.

5. By laying off its employee Philip Selman because of his union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employee Philip Selman immediate and full reinstatement to his former position of employment and make him whole for any loss of wages and other benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*,

90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Kanawha Stone Company, Inc., Nitron, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union activities.

(b) Granting show-up pay or any other benefit to employees in order to discourage them from their union activities.

(c) Laying off employees because of their union activities.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, offer Philip Selman full reinstatement to his former job, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Philip Selman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff and within 3 days thereafter notify the employees in writing that this had been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Nitro, West Virginia facility copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 10, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees regarding their union activities.

WE WILL NOT grant show-up pay or any other benefits to discourage employees from their union activities.

WE WILL NOT lay off employees because of their interest in and activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Philip Selman full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Philip Selman whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Board's Order, remove from our files any reference to the unlawful layoff and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

KANAWHA STONE COMPANY, INC.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."